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No. _____

In The

Supreme Court of the United States

October Term, 1994

AUTO CLUB INSURANCE ASSOCIATION,
Petitioner,
v.
WHITE & WHITE, INC.,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE MICHIGAN SUPREME COURT

AND APPENDIX

DAVID J. LANCTOT
HANLON, BECKER, LANCTOT, McCUTCHEON, SCHOOLMASTER & TAYLOR
2000 First Federal Building
Detroit, Michigan 48226
(313) 237-5656
Co-Counsel for Petitioner

JAMES G. GROSS
Counsel of Record
GROSS, NEMETH & SILVERMAN, P.L.C.
444 Penobscot Building
Detroit, Michigan 48226
(313) 963-8200
Co-Counsel for Petitioner

Interstate Brief & Record Company, *a division of* North American Graphics, Inc.
1629 West Lafayette Boulevard, Detroit, MI 48216 (313) 962-6230

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QUESTION PRESENTED

Respondent is a self-insured ERISA welfare benefit plan whose contract contains a specific provision stating that it provides no coverage for injuries arising out of an accident involving an automobile for which there is in effect a policy of no-fault insurance. Petitioner is a no-fault insurer which issued a policy to one of Respondent's participants who opted to purchase coordinated medical coverage at a reduced premium. The no-fault policy accordingly states that Respondent's plan provides primary coverage. The question is:

> WHETHER FEDERAL COMMON LAW, WHICH GOVERNS THIS DISPUTE, PROVIDES FOR PRO RATA APPORTIONMENT OF LIABILITY BETWEEN AN ERISA PLAN AND AN APPLICABLE NO-FAULT AUTOMOBILE INSURANCE POLICY WHERE THE PLAN AND THE INSURANCE POLICY CONTAIN CONFLICTING COORDINATION OF BENEFITS PROVISIONS?

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No. _____

In The

Supreme Court of the United States

October Term, 1994

AUTO CLUB INSURANCE ASSOCIATION,
Petitioner,
v.
WHITE & WHITE, INC.,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE MICHIGAN SUPREME COURT

Auto Club Insurance Association respectfully petitions for a writ of certiorari to review the judgment of the Michigan Supreme Court in this case.

OPINIONS BELOW

The order of the Michigan Supreme Court denying Petitioner's delayed application for leave to appeal (A-1) is reported at 445 Mich. 914 (1994). The order of the Michigan Court of Appeals (A-2) peremptorily affirming the trial court is unreported. The trial court judgment (A-3) is likewise unreported. None of the aforementioned courts issued opinions in connection with the aforementioned orders.

JURISDICTION

On October 11, 1993, the Wayne County (Michigan) Circuit Court entered a Judgment (A-3) of no cause of action in favor of Respondent and against Petitioner. On December 15, 1993, the Michigan Court of Appeals entered an order (A-2) peremptorily affirming the trial

court. On May 27, 1994, the Michigan Supreme Court entered an order (A-1) denying Petitioner's delayed application for leave to appeal from the Court of Appeals order. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a).

STATUTORY PROVISION INVOLVED

This case involves the federal common law supplementing the provisions of the Employee Retirement Income Security Act of 1974 (ERISA), as amended, 29 U.S.C. § 1001 *et seq. See, e.g., Pilot Life Insurance Co* v. *Dedeaux*, 481 U.S. 41, 56 (1987); *Franchise Tax Board* v. *Construction Laborers Vacation Trust*, 463 U.S. 1, 24 n.6 (1983). The specific provision here at issue reads as follows:

"**29 USC § 1144**

"§ 1144. OTHER LAWS

"(a) *Supersedure; effective date*

Except as provided in subsection (b) of this section, the provisions of this subchapter and subchapter III of this chapter shall supersede any and all State laws insofar as they may now or hereafter relate to any employee benefit plan described in section 1003(a) of this title and not exempt under section 1003(b) of this title. This section shall take effect on January 1, 1975.

"(b) *Construction and application*

(1) This section shall not apply with respect to any cause of action which arose, or any act or omission which occurred, before January 1, 1975.

(2)(A) Except as provided in subparagraph (B), nothing in this subchapter shall be construed to exempt or relieve any person from any law of any State which regulates insurance, banking, or securities.

(B) Neither an employee benefit plan described in section 1003(a) of this title, which is not exempt under section 1003(b) of this title (other than a plan established primarily for the purpose of providing death benefits), nor any trust established under such a plan, shall be deemed to be an insurance company or other insurer, bank, trust company, or investment company or to be engaged in the business of insurance or banking for purposes of any law of any State purporting to regulate insurance companies, insurance contracts, banks, trust companies, or investment companies.

(3) Nothing in this section shall be construed to prohibit use by the Secretary of services or facilities of a State agency as permitted under section 1136 of this title."

STATEMENT OF THE CASE

This is a subrogation action brought by Petitioner, a Michigan no-fault insurer, against Respondent, a self-insured ERISA plan. The sole and dispositive issue in the case is whether federal common law requires proration between the parties of liability for medical ex-

penses incurred by a person injured in an automobile accident who was an insured under Petitioner's no-fault policy and also a participant in Respondent's ERISA plan, where the policy and the plan have mutually exclusive coordination of benefits (COB) clauses.

The trial court granted summary disposition in favor of Respondent on the basis of the Michigan Supreme Court's decision in *Auto Club Insurance Association* v. *Frederick & Herrud, Inc.*, 443 Mich. 358; 505 N.W.2d 820, *reh. den.*, 444 Mich. 1202; 509 N.W.2d 156 (1993), *cert. den. sub. nom. Auto Club Insurance Association* v. *Pentwater Wire Products, Inc.*, ___ U.S. ___; 114 S.Ct. 1300 (1994). The Michigan Court of Appeals affirmed peremptorily; the Michigan Supreme Court denied Petitioner's delayed application for leave to appeal.

A. *Historical Facts*

The material facts are undisputed.

On April 15, 1984, Carl Raymond was injured when he was struck by an auto as he was crossing a street. At the time, he was an employee of Respondent and, as such, a participant in Respondent self-funded Employee Benefit Health Plan and Trust ("Plan"). The Plan was organized and operated under the ERISA, 29 U.S.C. § 1001 *et seq.*

Mr. Raymond was also insured under a policy of no-fault insurance issued by Petitioner, who paid approximately $144,000 in medical expenses incurred by Mr. Raymond. The parties have stipulated that the amount that would have been paid by Respondent but for its escape COB clause is $108,557.31.

B. *Proceedings Below*

On April 15, 1985, Petitioner filed the instant case in Wayne County Circuit Court seeking reimbursement for

the medical expenses it had paid. Petitioner alleged that Respondent was primarily liable for payment of those benefits by virtue of the following COB provision in Petitioner's policy:

> "LIMITS OF LIABILITY
>
> "PERSONAL PROTECTION INSURANCE. **Our** liability for Personal Protection Insurance Benefits payable to or on behalf of any one person who sustains **bodily injury** in any one **motor vehicle** accident is limited as set out below."
>
> * * *
>
> "If the Declaration Certificate shows Coordinated Medical Benefits, sums paid or payable to or for **you** or any **relative** shall be reduced by any amount paid or payable under any valid and collectible: individual, blanket or group disability or hospitalization insurance; medical, surgical or hospital direct pay or reimbursement health care plan; Workers' Compensation Law, disability law of a similar nature, or any other **state** or federal law; or **car** or premises insurance affording medical expense benefits."

(A-12) (bold print in original) (underlining added).

Respondent retorted that its liability was excluded by the following escape provision in its contract:

> **"EXCLUSIONS APPLICABLE TO ALL MEDICAL BENEFITS PROVIDED BY THE WHITE & WHITE EMPLOYEE COMPREHENSIVE HEALTH PLAN**
>
> "No benefit payment will be made under this Plan for expenses incurred by a covered employee, or dependent, for the following:"
>
> * * *

> "(Q) **NO BENEFITS ARE PAYABLE UNDER THIS PLAN FOR INJURIES RECEIVED IN AN ACCIDENT INVOLVING A CAR OR OTHER MOTOR VEHICLE WHICH IS OWNED OR LEASED BY A COVERED PERSON OR ANY MEMBER OF HIS IMMEDIATE FAMILY OR INVOLVING ANY CAR OR OTHER MOTOR VEHICLE FOR WHICH THERE IS IN EFFECT A POLICY OF NO FAULT INSURANCE:**"

(A-14, A-16) (bold print in original).

On January 22, 1987, the parties agreed to dismiss the case without prejudice because there was then pending in the United States Court of Appeals for the Sixth Circuit a potentially dispositive case involving ERISA preemption, *Northern Group Services, Inc.* v. *Auto-Owners Insurance Co.*, 833 F.2d 85 (6th Cir. 1987), *cert. den. sub. nom. Northern Group Services, Inc.* v. *State Farm Mutual Auto Ins. Co.*, 486 U.S. 1017 (1988). (A-9). *Northern Group Services* was decided favorably to Petitioner, holding that ERISA preemption did not affect § 3109a of the Michigan No-Fault Act as interpreted by the Michigan Supreme Court in *Federal Kemper Ins. Co.* v. *Health Ins. Administration, Inc.*, 424 Mich. 537; 383 N.W.2d 590 (1986).

On November 13, 1989, Petitioner filed a Motion for Reinstatement and Motion for Summary Disposition. On March 20, 1991, the trial court entered an order reinstating the case and granting summary disposition in favor of Petitioner in the amount of $108,557.31 plus interest. (A-7). Respondent appealed to the Michigan Court of Appeals.

On March 4, 1993, the Court of Appeals vacated the circuit court judgment on the basis of this Court's holding in *FMC Corp.* v. *Holliday*, 498 U.S. 52 (1990). (A-5). However, the Court of Appeals remanded the case for resolution of the COB dispute under federal common law. (*Id.*).

On September 8, 1993, Respondent filed a motion for summary disposition on the ground, *inter alia*, that federal common law required full enforcement of its COB provision. During the pendency of that motion, the Michigan Supreme Court rendered its decision in *A.C.I.A.* v. *Federal & Herrud*, in which it held that federal common law required enforcement of an unambiguous COB clause in an ERISA plan. Because that decision required the trial court to rule in favor of Respondent, the parties agreed that a judgment to that effect had to be entered.[1] Such a judgment was entered on October 11, 1993. (A-3).

Petitioner filed an appeal to the Michigan Court of Appeals. On December 15, 1993, that court entered an order (A-2) peremptorily affirming the trial court on the basis of the *Frederick & Herrud* decision.

Petitioner filed a delayed[2] application for leave to appeal to the Michigan Supreme Court. On May 27, 1994, that Court entered an order (A-1) denying the application.

REASONS FOR GRANTING THE PETITION

There is a general recognition of the need for a uniform federal common law rule governing conflicting

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1 **Under Michigan law, the parties' agreement to entry of that judgment did not impair Petitioner's right to appeal it. *E.g.*, *Dybata* v. *Kistler*, 140 Mich. App. 65, 68; 362 N.W.2d 891 (1985). The Michigan Court of Appeals so ruled in the instant case when it denied Respondent's motion to dismiss Petitioner's appeal. (A-2).**

2 **The Michigan Court Rules expressly allow the filing of a delayed application for leave to appeal (i.e., one filed more than 21 days after entry of the order appealed from, M.C.R. 7.302[C][2]) up to 56 days following entry of the order appealed from. M.C.R. 7.302(C)(3). The delay therefore did not create a jurisdictional bar to the Michigan Supreme Court's consideration of the application, and that Court did in fact consider it. (A-1).**

COB clauses in ERISA cases. However, there the consensus ends. The cases which have purportedly applied "the" federal common law rule are literally all over the judicial map. The continuing litigation generated by that confusion is starkly inconsistent with the Congressional design of an ERISA system governed by a uniform and easily applied body of federal law. It is time for this Court to end a decade of litigation over a readily resolvable question.

I.

THE FEDERAL COMMON LAW RULE ARTICULATED BY THE MICHIGAN SUPREME COURT AND BY THE SIXTH CIRCUIT DIRECTLY CONFLICTS WITH A DECISION OF THE SEVENTH CIRCUIT, INDIRECTLY CONFLICTS WITH A DECISION OF THE THIRD CIRCUIT, AND IS INCONSISTENT WITH THE DECISIONS OF SEVERAL OTHER STATE COURTS IN THE ERISA CONTEXT.

With regard to the question here presented, the California Court of Appeal recently observed that "federal law is not uniform, and is not going to be uniform until the United States Supreme Court finally decides the matter." *Inter Valley Health Plan* v. *Blue Cross/Blue Shield of Connecticut*, 16 Cal. App. 4th 60, 66; 19 Cal. Rptr. 2d 782 (1993), *cert. den.*, ___ U.S. ___; 114 S.Ct. 881 (1994). The rule applied in the instant case directly conflicts with a Seventh Circuit decision which would hold that liability should be prorated between parties, and also with a decision of the Third Circuit which would hold Respondent's escape clause unenforceable in the first instance.

The lower courts' decisions in the instant case were predicated on the Michigan Supreme Court's opinion in *Auto Club Insurance Association* v. *Frederick & Herrud*. The federal common law rule promulgated in that case is that where an ERISA plan and a non-ERISA plan or

policy both contain valid, unambiguous, and irreconcilable COB clauses purporting to make the other primary, the language in the non-ERISA policy is to be ignored. A recent Sixth Circuit decision has also so held. *Auto-Owners Ins. Co.* v. *Thorn Apple Valley, Inc.*, ___ F.3d ___ (6th Cir. 1994) (1994 W.L. 394086).

Both of the aforementioned decisions are in direct conflict with the Seventh Circuit's decision in *Winstead* v. *Indiana Ins. Co.*, 855 F.2d 430 (7th Cir. 1988), *cert. den.*, 488 U.S. 1030 (1989). In *Winstead*, the Seventh Circuit affirmed the district court's decision to prorate liability between an ERISA plan and a no-fault insurer where both the plan and the policy contained unambiguous and irreconcilable COB clauses purporting to make each excess over the other.

Although not applying it in the cases before them, other courts have also cited proration or some other form of apportionment between coverages as the correct resolution of conflicting COB clauses in the ERISA context. *Blue Cross and Blue Shield of Kansas, Inc.* v. *Riverside Hospital*, 237 Kan. 829, 835, 703 P.2d 1384 (1985); *Blue Cross & Blue Shield of Mississippi, Inc.* v. *Larson*, 485 So2d 1071, 1075 (Miss. 1986); *Starks* v. *Hospital Service Plan of N.J., Inc.*, 182 N.J. Super. 342, 440 A.2d 1353, 25 A.L.R. 4th 1009, 1017-18 (1981), *aff'd*, 91 N.J. 433, 453 A.2d 159 (1982). *See also, Northeast Department ILGWU Health and Welfare Fund* v. *Teamsters Local Union No. 229 Welfare Fund*, 764 F.2d 147, 161 n.13 (3rd Cir. 1985). The decision in the instant case indirectly conflicts with those cases to the extent that it rejected the apportionment approach.

The decision in the instant case is also inconsistent with other cases which have adopted a potpourri of other approaches to conflicting COB clauses in the ERISA context. *P.M. Group Life Insurance Co.* v. *Western Growers Assurance Trust*, 953 F.2d 543 (9th Cir. 1992)

("birthday rule"); *Reenforcing Iron Workers Local 426 Health and Welfare Fund* v. *Michigan Bell Telephone Co.*, 746 F. Supp. 668 (E.D. Mich. 1990) (same); *Inter Valley Health Plan* v. *Blue Cross/Blue Shield of Connecticut*, *supra* (follow terms of state court divorce judgment); *Blue Cross and Blue Shield of Kansas, Inc.* v. *Riverside Hospital*, *supra* (ERISA plan primary under non-ERISA policy because claimant was participant in former and covered dependent under latter).

The result[3] in the instant case is also inconsistent with the decision of the Third Circuit in *Northeast Department ILGWU Health & Welfare Fund* v. *Teamsters Local Union No. 229 Welfare Fund*. That case involved conflicting COB clauses in two ERISA plans: the Teamsters plan provided that it was excess over the ILGWU plan; the latter plan provided that it afforded *no* coverage because the claimant was also covered under the Teamsters plan.

The Third Circuit held the ILGWU escape clause unenforceable as a matter of federal common law. The basis for that holding was that relegating a beneficiary to the coverage afforded by another plan could leave the beneficiary with much less favorable coverage than that to which he would be entitled under his own plan.[4]

---

[3] In the interest of candor, Petitioner points out that in the lower courts it did not rely on the *ILGWU* case as a basis for totally invalidating Respondent's escape clause. Instead, Petitioner has consistently sought only the lesser relief of prorata contribution from Respondent. The point of discussing *ILGWU* here is to underscore the absolute disarray in the federal common law in this area.

[4] That would *not* be the case here, because Michigan no-fault benefits include unlimited medical coverage. M.C.L. 500.3107; M.S.A. 24.13107. However, a beneficiary could be severely disadvantaged if the no-fault insurance applicable to the accident is *not* Michigan no-fault insurance, but rather a more limited variety such as exists in other states. Furthermore, in *ILGWU*, the Third Circuit invalidated the escape clause despite the fact that both plans provided comparable coverage.

The Third Circuit found such a result contrary to the Congressional intent to protect beneficiaries and participants of ERISA plans. Id. at 162-64.

Given the above-described judicial landscape, the lower courts could hardly have rendered a decision in the instant case which did not directly or indirectly conflict with a decision of a federal Circuit Court or of another state court of last resort. That circumstance underscores the need for this Court to decide the question presented and resolve the conflict in this area.

II.

IT IS IMPORTANT THAT THIS COURT PROMULGATE A UNIFORM FEDERAL COMMON LAW RULE GOVERNING CONFLICTING COORDINATION OF BENEFIT CLAUSES IN CASES GOVERNED BY THE ERISA.

The importance of the question presented is a function of the number of persons affected by the ERISA, the number of extant and potential disputes involving that question, and the needlessly wasteful ramifications of allowing the issue to remain unresolved.

The national implications of disputes such as this in terms of the number of persons and entities affected is undeniable. As of 1988, approximately 95% of American workers were participants in employer-sponsored health plans. Wiatrowski, *Comparing Employee Benefits in the Public and Private Sectors*, reprinted in *U.S. Bureau of Labor Statistics, Department of Labor, Monthly Labor Review*, p. 4 (December 1988). The prevalence of no-fault automobile insurance laws across the country also ensures that the issues presented here will have more than mere local implications.

Moreover, the question here presented is not necessarily limited to disputes between ERISA plans and no-

fault insurers. Disputes over conflicting COB clauses also arise between one ERISA plan and another. *See, e.g., P.M. Group Life Insurance Co.* v. *Western Growers Assurance Trust, supra*; *Northeast Department ILGWU Health and Welfare Fund* v. *Teamsters Local Union No. 229 Welfare Fund, supra*; *Inter Valley Health Plan* v. *Blue Cross/Blue Shield of Connecticut, supra*. A *uniform* federal common law rule would resolve *all* such disputes.

Finally, it is painfully obvious that the federal and state courts deciding such disputes have had no success in developing a uniform federal common law rule. Although the apportionment rule herein suggested has wide and increasing currency in state common law, the instant case is only the most recent example of the pervasive insistence of both federal and state courts on applying or inventing others in ERISA cases. Such rulings have already spawned two very recent requests (in the *Frederick & Herrud* and *Inter Valley Health Plan* cases) to this Court for a definitive resolution. Given the dim prospects for any kind of consensus, it is certain that litigation on the question presented will continue to consume resources which could be better spent on health care for the workers whom Congress intended to benefit.

❧ ❧ ❧

CONCLUSION

This Court should grant the Petition for Writ of Certiorari.

Respectfully submitted,

By: /s/ JAMES G. GROSS
Counsel of Record
GROSS, NEMETH & SILVERMAN, P.L.C.
444 Penobscot Building
Detroit, Michigan 48226
(313) 963-8200
Co-Counsel for Petitioner

By: DAVID J. LANCTOT
HANLON, BECKER, LANCTOT,
McCUTCHEON, SCHOOLMASTER & TAYLOR
2000 First Federal Building
Detroit, Michigan 48226
(313) 237-5656
Co-Counsel for Petitioner

DATED: August 16, 1994

APPENDIX TO PETITION FOR CERTIORARI

• • •

ORDER GRANTING IMMEDIATE CONSIDERATION AND DENYING LEAVE TO APPEAL

(State of Michigan — Supreme Court)

(Entered May 27, 1994)

(AUTO CLUB INSURANCE ASSOCIATION, Plaintiff-Appellant, v WHITE & WHITE, INC., Defendant-Appellee — SC: 98818; CoA: 169808; LC: 85-509722-CK)

On order of the Court, the motion for immediate consideration and the delayed application for leave to appeal are considered. The motion for immediate consideration is GRANTED. The delayed application for leave to appeal is DENIED, because we are not persuaded that the question presented should be reviewed by this Court.

ORDER OF PEREMPTORY AFFIRMANCE

(State of Michigan — Court of Appeals)

(Dated December 15, 1993)

(Auto Club Ins Assoc v White & White, Inc — Docket #169808; L.C. #85-509722 CK)

Martin M. Doctoroff, C.J., Presiding Judge;
William B. Murphy, Maureen P. Reilly, Judges.

The Court, pursuant to MCR 7.216(A)(7), orders that the judgment of the circuit court is AFFIRMED. MCR 7.216(A)(7) provides that this Court "may, *at any time*, in addition to its general powers, in its discretion, and on ~~the *terms it*~~ *deems just:* (7) enter any judgment as the *case may require*". This Court reads that Court rule to permit the entry of this order in light of the parties have agreed through a consent judgment that under the present Michigan Supreme Court cases that the defendant is entitled to judgment. This Court lacks the authority to reverse the Michigan Supreme Court cases of *ACIA* v *Frederick & Herrud Inc*, 443 Mich 358 (1993) and therefore it makes no sense to require full briefing and extensive work by this Court simply to come to the conclusion that this Court has no authority to reverse the circuit court. The Court finds that this is one of the very few cases before the Court where MCR 7.216(A)(7) should be invoked to enter a peremptory order of affirmance so that the parties can proceed to the Supreme Court to challenge a prior decision of the Supreme Court.

The Court orders that the motion to dismiss is DENIED.

A true copy entered and certified by Ella Williams, Chief Clerk, on DEC. 15, 1993.
/s/ Ella Williams, Chief Clerk

CONSENT JUDGMENT

(State of Michigan — Circuit Court — County of Wayne)

(Filed October 11, 1993)

(AUTO CLUB INSURANCE ASSOCIATION, Plaintiff, v. WHITE & WHITE, INC., Defendant — Case No. 85-509722-CK; HON. JAMES J. RASHID)

The parties, by and through their counsel, hereby stipulate and agree that a Consent Judgment can be and shall be entered in favor of White & White and against AAA in this case of no cause of action. This Consent Judgment is being entered into based upon the Michigan Supreme Court decisions in the cases of *ACIA* v. *Frederick & Herrud, Inc.* (Mich. Supreme Court Case No. 93816) and *ACIA* v. *Pentwater Products, Inc.* (Mich. Supreme Court Case No. 93925) because the decision is binding upon this Circuit Court and controls the issues in this action.

BRANDT, HANLON, BECKER, LANCTOT,
McCUTCHEON, SCHOOLMASTER & TAYLOR
Attorneys for Plaintiff
By: David J. Lanctot (P16378)
1700 First Federal Building
Detroit, MI 48226

Dated: *10/2/93*

MILLER, JOHNSON, SNELL & CUMMISKEY
Attorneys for Defendant
By: Richard R. Hyde (P29128)
Business Address:
800 Calder Plaza Building
Grand Rapids, MI 49503

Dated: *9/29/93*

JUDGMENT

At a session of said Court held in the City-County Building, City of Detroit, County of Wayne, State of Michigan, on this 11 day of October, 1993.

PRESENT: HONORABLE JAMES J. RASHID,
Circuit Court Judge

Pursuant to the above Stipulation, it is hereby ORDERED AND ADJUDGED that a judgment of no cause of action in favor of defendant White & White and against plaintiff Auto Club Insurance Association shall be and hereby is entered in this case and the plaintiff's Complaint against defendant is hereby dismissed. This Judgment is mandated by the Michigan Supreme Court decisions referenced above and are hereby made a part of this Judgment.

/s/ JAMES J. RASHID
HONORABLE JAMES J. RASHID

OPINION

(State of Michigan — Court of Appeals)

(Dated March 4, 1993)

(AUTO CLUB INSURANCE ASSOCIATION, Plaintiff-Appellee, v WHITE & WHITE, INC., Defendant-Appellant — No. 139620)

Before: Wahls, P.J., and Michael J. Kelly and Connor, JJ.

PER CURIAM

Defendant appeals as of right the trial court's summary judgment. We vacate the judgment and remand for further proceedings.

An employee of defendant's was seriously injured in an automobile accident in 1984. The employee had no-fault insurance with plaintiff, and the no-fault policy provided for coordination of benefits with the employee's health insurance. See MCL 500.3109a; MSA 4.13109(1). At the time, defendant's health insurance plan provided:

> NO BENEFITS ARE PAYABLE UNDER THIS PLAN FOR INJURIES RECEIVED IN AN ACCIDENT INVOLVING A CAR OR OTHER MOTOR VEHICLE WHICH IS OWNED OR LEASED BY A COVERED PERSON OR ANY MEMBER OF HIS IMMEDIATE FAMILY OR INVOLVING ANY CAR OR OTHER MOTOR VEHICLE FOR WHICH THERE IS IN EFFECT A POLICY OF NO FAULT INSURANCE.

On the basis of this provision, defendant refused to pay for the employee's medical expenses. Plaintiff paid, and brought this action seeking reimbursement. The trial court granted defendant's summary disposition, finding that plaintiff was entitled to reimbursement as a matter of law.

Under our Supreme Court's decision in *Federal Kemper Ins Co* v *Health Ins Administration, Inc*, 424 Mich

537; 383 NW2d 590 (1986), plaintiff might have been entitled to reimbursement according to Michigan law. But see *Wolverine Mutual Ins Co* v *Rospatch Corp Employee Benefit Plan*, 195 Mich App 302, 06-307; ___ NW2d ___ (1992). However, both parties now concede that because of the United States Supreme Court's decision in *FMC Corp* v *Holliday*, 498 US ___; 111 S Ct 403; 112 L Ed 2d 356 (190), state law is preempted and resolution of this dispute is controlled by federal common law. See also *Auto Club Ins Ass'n* v *Frederick & Herrud, Inc (On Remand)*, 191 Mich App 471; 479 NW2d 18 (1991). Whether plaintiff is entitled to reimbursement under federal law requires trial court analysis of federal precedent. See *Auto Club Ins* v *Health and Welfare Plans, Inc*, 961 F2d 588, 593-595 (CA 6, 1992). We therefore vacate the judgment of the trial court and remand for further proceedings in accordance with federal law.

Vacated and remanded. We do not retain jurisdiction.

/s/ Myron H. Wahls
/s/ Michael J. Kelly
/s/ Michael J. Connor

**ORDER REINSTATING CASE
AND GRANTING SUMMARY JUDGMENT TO PLAINTIFF**

(State of Michigan — Circuit Court — County of Wayne

(Dated March 20, 1991)

(AUTO CLUB INSURANCE ASSOCIATION, Plaintiff, v. WHITE & WHITE, INC., Defendant — Case No. 85-509722-CK; HON. JAMES J. RASHID)

At a session of said Court held in the City of Detroit, County of Wayne, State of Michigan, on MAR. 20, 1991.

PRESENT: HONORABLE JAMES J. RASHID,
Circuit Judge

Plaintiff, Auto Club Insurance Association ("ACIA"), having filed a motion to reinstate and a motion for summary judgment, and defendant White & White, Inc. having opposed both motions and having filed a cross-motion for summary judgment, and both sides having briefed and argued the issues as to the propriety of the granting of the motions for summary judgment and the amount of judgment interest, and after oral argument in open court on January 19, 1990, at which time the Court granted ACIA's motion for summary judgment, but reserved ruling on the interest question, and based upon subsequent briefs filed by the parties as to the question of interest, and the Court having issued its order awarding interest to plaintiff on November 26, 1990; and the Court otherwise being fully advised in the premises;

IT IS HEREBY ORDERED that the ACIA's motion to reinstate the case is hereby granted, and this case is hereby reinstated.

IT IS FURTHER ORDERED that ACIA's motion for summary judgment is granted and the cross-motion for summary judgment of White & White is denied.

IT IS FURTHER ORDERED that the judgment in favor of ACIA shall be in the principal amount of $108,557.31. The judgment interest shall include pre-filing interest at the rate of 5 percent from the date of payment of the medical expenses by ACIA until the date the complaint was filed, interest at the rate of 5 percent (note the 12 percent statutory rate in effect at the time of filing) during the time that the case was dismissed with the right of reinstatement by stipulation of the parties, that being January 26, 1987 through January 19, 1990, the statutory 12 percent rate of interest from the date the complaint was filed until the case was dismissed with the right of reinstatement on January 22, 1987, and the statutory rate of 12 percent for the period after January 19, 1990, when the case was reinstated. Specifically, the judgment interest is calculated as follows: $2,026.61 for 5 months of pre-filing interest at 5 percent; $21,068.66 for the period May, 1985 through January 21, 1987; $16,283.52 in interest for the period January 22, 1987 through January 19, 1990 and $1,085.57 per month for the period January 19, 1990 through the date of this Judgment and continuing until satisfaction of the Judgment.

/s/ JAMES J. RASHID
Circuit Court Judge

Approved as to form only:
/s/ David J. Lanctot
Attorney for Plaintiff
/s/ Richard R. Hyde
Attorney for Defendant

STIPULATION DISCONTINUING CAUSE

(State of Michigan — Circuit Court — County of Wayne)

(Dated January 22, 1987)

(AUTO CLUB INSURANCE ASSOCIATION, Plaintiff, -v- WHITE & WHITE, INC., Defendant — Case No: 85-509722-CK; HON. RICHARD C. KAUFMAN)

IT IS HEREBY STIPULATED AND AGREED by and between the parties hereto, through their respective attorneys, that the above cause be discontinued without prejudice and without costs to either party.

MILLER, JOHNSON, SNELL & CUMMISKEY
By: RICHARD R. HYDE (P29128)
Attorney for Defendant
800 Calder Plaza Bldg.
Grand Rapids, MI. 49503

BRANDT, HANLON, BECKER, LANCTOT, McCUTCHEON, SCHOOLMASTER & TAYLOR
By: DAVID J. LANCTOT (P16378)
Attorney for Plaintiff
1700 First Federal Bldg.
Detroit, MI. 48226

ORDER

At a session of said Court held in this County of Wayne, State of Michigan on _____.

PRESENT: HONORABLE JAMES RASHID
CIRCUIT COURT JUDGE

In accordance with a Stipulation to that effect,

IT IS HEREBY ORDERED THAT the above cause be, and the same hereby is discontinued without prejudice and without costs to either party.

/s/ JAMES J. RASHID
HONORABLE JAMES J. RASHID

EXCERPT FROM ACIA's NO-FAULT POLICY

* * *

[Page 7] . . . **you** or any **relative** while **occupying a motor vehicle** owned or registered by **your** or their employer for which security is maintained as required under the provisions of the **Code**;

any **relative** entitled to Personal Protection Insurance Benefits as a person named under the terms of any other policy;

any person, other than **you** or any **relative**, entitled to Personal Protection Insurance Benefits under the terms of any other policy;

the owner or registrant of a **motor vehicle** involved in the accident who has failed to maintain security on that **motor vehicle** as required by the **Code**.

This insurance does not apply to **bodily injury** or **property damage**:

suffered intentionally or caused intentionally by any person claiming benefits.

This insurance does not apply to **property damage**:

to any vehicle and its contents, including **trailers**, designed for operation upon a public highway by power, other than muscular power, unless the vehicle is parked so as not to cause unreasonable risk of the **property damage** which occurred;

to any property owned by **you** or a **relative**;

to the property of any person who is using the **insured motor vehicle** without **your** expressed or implied consent;

to any utility transmission lines, wires or cables arising from the failure of a municipality, utility company, or cable television company to comply with the requirements of Michigan Law.

LIMITS OF LIABILITY

PERSONAL PROTECTION INSURANCE. **Our** liability for Personal Protection Insurance Benefits payable to or on behalf of any one person who sustains **bodily injury** in any one **motor vehicle** accident is limited as set out below.

MEDICAL BENEFITS (ALLOWABLE EXPENSES) shall include reasonable and customary charges for semi-private hospital accommodations except when the **insured person** requires special care; funeral and burial expenses not to exceed $1,000;

If the Declaration Certificate shows Coordinated Medical Benefits, sums paid or payable to or for **you** or any **relative** shall be reduced by any amount paid or payable under any valid and collectible: individual, blanket or group disability or hospitalization insurance; medical, surgical or hospital direct pay or reimbursement health care plan; Workers' Compensation Law, disability law of a similar nature, or any other **state** or federal law; or **car** or premises insurance affording medical expense benefits.

WORK LOSS BENEFITS shall include payment for loss which occurs during the life of the **insured person** and within three years of the date of the accident; loss of services benefits not to exceed $20 per day;

Benefits payable for loss of income from work shall be reduced by 15%. If the **insured person**'s

income tax advantage is less than 15% the actual percentage shall apply;

After the application of the above limits, the combined total amount payable for Work Loss in any 30-day period and the income earned shall not exceed the maximum amount established under the **Code**. If greater, the amount shown on the Declaration Certificate will be paid. The combined total limit shall be reduced pro rata for any period of less than 30 days;

If the Declaration Certificate shows Coordinated Work Loss Benefits, sums paid or payable to **you** or any **relative** for loss of income from work shall be reduced by any amount paid or payable under any valid and collectible: individual, blanket, group accident or disability insurance; salary or wage continuation plan; Workers' Compensation Law, disability law or a similar nature, or any other **state** or federal law.

SURVIVORS' LOSS BENEFITS shall include payment for loss which occurs after the death of the **insured person** and within three years of the date of the accident; loss of services benefits not to exceed $20 per day;

After the application of the above limits, the combined total amount payable in any 30-day period for Survivors' Loss shall not exceed the maximum amount established under the **Code**.

We will subtract benefits provided or required to be provided under the laws of any **state** or federal government from the benefits otherwise payable under this coverage even though the **insured person** has failed to apply for them. It is the obligation of the **insured person** to apply for any benefits provided or required to

be provided under the laws of any **state** or federal government. It is also the obligation of the **insured person** to reapply, appeal or file suit for those governmental benefits if the initial application is rejected.

Amounts payable under Personal Protection Insurance shall be reduced by any deductible stated on the Declaration Certificate. The deductible applies only to **you** or **your relatives** and shall not exceed the sum of $300 in any one accident.

PROPERTY PROTECTION INSURANCE. Regardless of vehicles insured or policies held, the Limit of **our** Liability under this coverage for all **property damage** from one accident is $1,000,000. Payment is limited to the lesser of reasonable repair costs or replacement costs less depreciation and, where applicable, the value of loss of use.

* * *

PLAN EXCERPT

EXCLUSIONS APPLICABLE TO ALL MEDICAL BENEFITS PROVIDED BY THE WHITE & WHITE EMPLOYEE COMPREHENSIVE HEALTH PLAN

No benefit payment will be made under this Plan for expenses incurred by a covered employee, or dependent, for the following:

(a) while in any hospital owned or operated by the Federal government unless the covered person is legally required to pay any portion or all of such incurred expenses; or, which is reimbursed under any Federal or State sponsored medical care plan; or, for which the covered person would be eligible under Worker's Compensation or Employer's Liability Laws (this exclusion does not apply to employer-employee insurance programs or plans where the employer is a unit of government);

(b) expenses eligible under the terms of Medicare excepting those in excess of Medicare payments; but, any covered person who at any time was entitled to enroll in the entire or voluntary Medicare program (Parts A and/or B) but who did not so enroll will be considered to be eligible for reimbursement hereunder this Plan in an amount equal to the amount to which he/she would have been entitled, if any, had he/she so properly enrolled;

(c) to the extent that payment under this Plan is prohibited by any law of jurisdiction in which the covered person resides at the time the expenses are incurred;

(d) for charges made or services performed which are deemed in excess of "reasonable and customary" expenses or required applications for the illness or injury under treatment;

(e) related to or in connection with any type of custodial care, education, or training purposes of the covered person except as specifically Scheduled;

(f) for routine medical examinations, immunizations, care, and treatments not necessitated by a diagnosed illness or injury in effect of the covered person;

(g) for any loss caused by war or any act of war (declared or undeclared), or, sustained while in the service or armed forces of any country or international coalition/organization of countries;

(h) for a loss resulting from participation in a riot, crime, or commitment of an assault, felony, or similar serious criminal offense;

(i) for treatment and services, if any, which are not recommended and approved by a physician;

(j) for eye examinations or fittings of eye glasses or lenses, or hearing tests and fitting of hearing aids;

(k) for the care and treatment of the teeth, gums, or alveolar process, or for dentures, appliances, or supplies used in such care and treatment, except as a result of and within 12 months after an accidental injury to the teeth by a violent external force for the treatment of injuries to *natural teeth*, or, for the setting of a jaw fractured or dislocated in such an accidental injury; or, for the hospital charges which are necessitated by a diagnosed concurrent hazardous medical condition of the covered person requiring such a patient to be

confined for the completion of multiple extractions of the teeth or dental services. Included would be outpatient surgery room facilities under the same terms. (Contact the Plan Administrator before admitting.);

(l) on expenses for which no charge or fee would have been made if this Plan had not existed (i.e., form completions, special doctor reports, Medicare assignment limits);

(m) for personal convenience items such as telephone, television, toiletries, sundries, radio, barber services (regardless of the billing source);

(n) for care by or in a convalescent nursing home or extended care facility (excepting the coverage previously specified and limited under the medical provisions);

(o) for any operations or surgeries and related procedures on cosmetic, beautifying, or electives — excepting that under special "medical circumstances" certain of the above may be submitted for review and approval by the Plan Administrator prior to actual performance;

(p) any admissions which are primarily to control or change the covered person's environment and during which the patient receives psychiatric care that could have safely and adequately been provided on an outpatient basis;

(q) NO BENEFITS ARE PAYABLE UNDER THIS PLAN FOR INJURIES RECEIVED IN AN ACCIDENT INVOLVING A CAR OR OTHER MOTOR VEHICLE WHICH IS OWNED OR LEASED BY A COVERED PERSON OR ANY MEMBER OF HIS IMMEDIATE FAMILY OR INVOLVING ANY CAR OR OTHER MOTOR VEHICLE FOR WHICH THERE IS IN EFFECT A POLICY OF NO FAULT INSURANCE.

Supreme Court, U.S.
FILED
SEP 12 1994
OFFICE OF THE CLERK

No. 94-313

In The

Supreme Court of the United States

October Term, 1994

AUTO CLUB INSURANCE ASSOCIATION,

Petitioner,

v.

WHITE & WHITE, INC.,

Respondent.

On Petition For Writ Of Certiorari To The Supreme Court Of Michigan

RESPONDENT'S BRIEF IN OPPOSITION

Counsel for Respondent
CHARLES C. HAWK (P14759)
MILLER, JOHNSON, SNELL & CUMMISKEY, P.L.C.
Attorneys for Respondent
800 Calder Plaza Building
Grand Rapids, MI 49503
(616) 459-8311

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
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QUESTION PRESENTED FOR REVIEW

Whether this Court should deny certiorari to the Michigan Supreme Court which ruled that a coordination of benefits provision in a self-funded ERISA plan prevails over a coordination of benefits provision in a Michigan state no-fault automobile policy?

PARTIES

Respondent, White & White, Inc., is a company which was purchased by Stuart's Drug. Stuart's Drug has subsequently been acquired by Owens & Minor.

OPINIONS BELOW

The order of the Michigan Supreme Court denying Petitioner, Auto Club Insurance Association's, delayed application for leave to appeal is reported at 445 Mich. 914 (1994). The order of the Michigan Court of Appeals peremptorily affirming the trial court is unreported. The trial court judgment is also unreported. The decisions and orders are attached as exhibits to the Petitioner's Writ in this action.

SUMMARY OF ARGUMENT AND ARGUMENT

Little time needs to be or should be spent on replying to the Petition for a Writ of Certiorari in this action. This very Petitioner sought a Petition for a Writ of Certiorari to the Michigan Supreme Court in an *identical* case in the case of *Auto Club Insurance Association, Petitioner v. Pentwater Wire Products, Inc.*, 443 Mich. 358; 505 N.W.2d 820, *reh. den.* 444 Mich. 1202; 509 N.W.2d 156 (1993); *cert. den. sub. nom. Auto Club Insurance Association v. Pentwater Wire Products, Inc.*, ___ U.S. ___; 114 S. Ct. 1300 (1994).

Therefore, this Court has previously decided that certiorari should not be granted to review the issues in this case. Nothing has changed since that decision was issued on March 21, 1994.

The issue in this case is unique to the state of Michigan because the coordination of benefits provision in the automobile policy issued by Petitioner is pursuant to a specific Michigan statutory requirement.

In addition, the Court should note that there is no basis for the Petitioner's attempt to argue that there is a conflict between the Sixth Circuit's decision in *Auto-Owners Insurance Company v. Thornapple Valley, Inc.*, ___ F.3rd ___ (6th Cir. 1994) (1994 W.L. 394086) and the Seventh Circuit's decision in *Winstead v. Indiana Insurance Company*, 855 F.2d 430 (7th Cir. 1988), *cert. den.* 488 U.S. 1030 (1989). The Sixth Circuit's decision in *Auto-Owners, supra,* is in accord with and reaches exactly the same result as the Michigan Supreme Court did in the present case, again under identical facts. The primary case relied upon both by the Michigan Supreme Court and the Sixth Circuit in *Auto-Owners, supra,* is this Court's case on ERISA preemption of *FMC Corp. v. Holiday*, 498 U.S. 52 (1990). The *Winstead* case was decided before this Court's decision in *FMC v. Holiday, supra.* The *Winstead* court relied upon pre-*FMC Corp. v. Holiday* law. Therefore, there are no inconsistencies among the federal circuit courts regarding the issue in this case.

CONCLUSION

This Court should deny the Petition for Writ of Certiorari. As this Court has just recently determined in an identical case, none of the considerations set forth in Rule 10 of the Rules of the Supreme Court are satisfied by Petitioner.

Respectfully submitted,

MILLER, JOHNSON, SNELL & CUMMISKEY, P.L.C.
CHARLES C. HAWK (P14759)
Attorneys for Respondent

Business Address:
800 Calder Plaza Building
Grand Rapids, MI 49503
(616) 459-8311

Dated: September 12, 1994.